Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NUMBER 85-650

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES B. McCORSTIN, JR., on his behalf and behalf of all others similarly situated,

PETITIONERS,

VERSUS

UNITED STATES STEEL CORPORATION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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INFORMATION REQUIRED BY RULE 28.1

Information required by this rule is included in petitioner's petition for writ of certiorari.

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ARGUMENT

The respondent's brief in opposition is not in compliance with Rules 22.1, 34.1(h), 34.1(i) and 34.2 of the Supreme Court of the United States and according to Rule 22.1 shall not be accepted because:

(1) it does not contain a summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief, and

(2) it does not contain an argument, exhibiting clearly the points of fact and of law being presented.

The respondent's brief precludes petitioner's compliance with Rule 22.5, which requires that a reply brief be addressed to arguments first raised in the brief in opposition.

However, in the event that the re-

spondent's brief in opposition is accepted, the petitioner would present this argument.

Congress, realizing that the courts were misconstruing the intent of the ADEA notice of intent to sue requirement, changed the ADEA in 1979 to require a charge of unlawful discrimination. The petitioner timely filed a notice of intent to sue on June 28, 1972 and a timely filed class charge of willful violation of the ADEA on August 28, 1972. The class action complaint was timely filed in district court on January 31, 1974. (McCorstin I) On appeal, the 5th Cir. reversed and remanded, holding that the district court abused its discretion in not allowing adequate discovery and a jury trial.

On November 12, 1976, twenty-one similarly situated persons timely filed a class action notice of intent to sue or

in the alternative to intervene in McCorstin I.

On May 15, 1979, McCorstin timely filed an opt-in class action on his behalf and behalf of all others similarly situated, (McCorstin II) (jurisdiction being the November 12, 1976 class notice of intent to sue.) The notice was also filed in McCorstin II stating that they would maintain the action on their behalf and behalf of all others similarly situated or in the alternative to intervene in McCorstin I.

The district court granted U.S. Steel an extension of time in which to answer. Prior to filing an answer, Chief Judge Frank H. McFadden granted summary judgment for U.S. Steel. U.S. Steel never filed an answer and the case never rose to the point of discovery or amendments or the filing of additional consents to sue.

In 1980, the 5th Cir. ultimately granted a motion for clarification in McCorstin II, stating:

> "Since it is now clear that the parties have been returned to the trial court for additional discovery and a jury trial, all claims should be resolved in that proceeding. Under these circumstances, we do not vacate our earlier rulings, but manifest justice requires a modification and clarification. Nothing contained in the rulings in this matter shall operate with prejudice against the appellant, McCorstin, as to any amendments he may propose to his pleadings in CA 74H100 S. Multiple suits are not necessary nor desirable."

It is this ruling, in simple and straight forward language, that authorized additional discovery and directed that all claims in the opt-in class action in McCorstin II be resolved in McCorstin I.

The district court has, in conflict with the rulings of the 5th Cir., dismissed the opt-in class action and denied McCorstin and all others similarly situated their statutory and case law right to have all their claims resolved in an

opt-in class action in McCorstin I, and the 11th Cir. has sanctioned this departure.

McCorstin, a pro se litigant, has been denied his statutory and case law right to represent himself and all others similarly situated in an opt-in class action in an ADEA action (29 U.S.C. § 216 (b) and case law in McCorstin I and McCorstin II). This is a federal question that has not been, but should be, settled by this Honorable Court.

The respondent has claimed that W. J. Barrett, Joseph L. Johnson and James E. Todd never sought to intervene at any time in the district court. W. J. Barrett and Joseph L. Johnson were in the November 12, 1976 class action notice of intent to sue which has been filed in both McCorstin I and McCorstin II. (App. 1I-9I) On September 13, 1982, James E. Todd filed in district court his

written consent to sue in McCorstin I. The petitioner has an original date-stamped, filed duplicate in his possession. Subsequently, and without notification to the petitioner or being informed of the action, the district court lined through "FILED" and hand wrote "Received." This is an abuse of discretion and/or fraud. The consent to sue can be found in the Record preceding page 876.

The respondent claims the Litras letter dealt with the treatment of management trainees at respondent's Fairfield works during the 1982 reduction-in-force, was written in August, 1982, over ten years after petitioner was laid off. Thus, the facts underlying petitioner's claim concerning the 1972 reduction-in-force are totally different from the facts underlying the 1982 reduction-in-force. Nothing could be fur-

ther from the truth. The facts are as follows: First, as pointed out in the Litras letter, U.S. Steel's actions were not confined to the Fairfield Works. The Litras letter reads in part, "...let me emphasize that the changes you refer to in your letter were not confined to Fairfield Works, but do, in fact, affect most of U.S. Steel Corporation." Second, there were no management trainees in 1982; they were management associates. In 1972 they were management trainees. Third, the Litras letter of August 18, 1982 stated:

> "We have not changed our policies and procedures as they concern Management Associates. We have consistently kept employees in this group working full time, even when they were called Management Trainees and classified as non-exempt. While you may not agree, it is vital to the continued health of U.S. Steel that we maintain our sources for future managers. Our experience has taught us that to do otherwise is a short-term expedient with negative long-term effects. We cannot repeat the mistakes of the past as they regard the recruitment and placement of new

college graduates." (emphasis added) Fourth, no management trainee or management associate was laid off due to any reduction-in-force during the period 1968 to August 18, 1982. And, it is this insulation of a group of employees from reduction-in-force that was found impermissible by this Honorable Court in the Memphis Fire Department case. U.S. Steel, by its own statement of policies and procedures, has not and does not have any intention of complying with the provisions of the ADEA. The district court's concealment of the evidence in the Litras letter is sufficient to call for an exercise of this Court's power of supervision.

Additionally, in 1980, the United States Court of Appeals for the Fifth Circuit granted additional discovery and a jury trial in McCorstin I and the "class action" McCorstin II. The court

below repeatedly denied the class action provisions of McCorstin II and the 11th Cir. has sanctioned the action by the district court in conflict with the rulings by the 5th Cir. In the sealed hearing held on July 27, 1983, filed on July 24, 1984, McCorstin reported to the court that he had taped evidence, obtained in 1982, of a conspiracy by U.S. Steel to intimidate his witnesses and to violate the Age Discrimination in Employment Act and the Employee Retirement Income Security Act and for the court to take knowledge of it. On January 3, 1984, McCorstin, in a recorded hearing filed January 19, 1984, reported to the court that he had a current charge with the E.E.O.C. This charge is a class action charge and has not been resolved.

The discovery deposition of Phoebe D. Tindle was filed on March 1, 1984,

which included the Litras letter of August 18, 1982.

On March 16, 1984, three days prior to trial, the court issued an order that "No evidence relating to layoffs, retirements, etc. of defendant's employees will be allowed except for the period 1968-1975" and "No evidence will be allowed with reference to reductions in force, layoffs and retirements occurring after 1975." The clear intention of the court was to conceal the evidence of class-wide violations of the ADEA and the criminal acts of U.S. Steel and to deny McCorstin, and all others similarly situated, their statutory and case law right to have all their claims resolved in one opt-in class action.

The above actions by the district court are more serious than abuse of discretion. They rise to concealment and obstruction of justice.

By plaintiff's motion, the taped evidence of conspiracy was received by the 11th Cir. and ordered to go forward with the case. Fraud has precluded justice in this action.

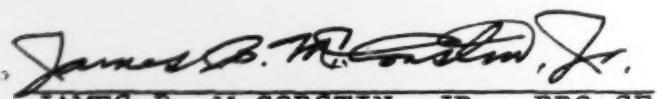
Finally, the rulings by the panel of the 11th Cir. are in conflict with the rulings by the 5th Cir. in McCorstin I and McCorstin II and the en banc rulings by the 11th Cir. in Bonner v. City of Prichard which has held that decisions of the former 5th Cir. handed down prior to October 1, 1981 are binding precedent.

CONCLUSION

There can be no doubt that McCorstin, a pro se litigant, has been denied his statutory and case law right to have all his claims resolved in McCorstin I in an opt-in class action, on his behalf and behalf of all others similarly situated. The decisions of the panel of the 11th Cir. are in conflict with the decisions of the 5th Cir. and the en banc decision of the 11th Cir. and calls for an exercise of this Court's power of supervision.

WHEREFORE, this Honorable Court should grant a writ of certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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